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No. 91-194

In The

Supreme Court of the United States

October Term, 1991

QUILL CORPORATION,
Petitioner,
v.

STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH DAKOTA

BRIEF FOR THE STATE OF NEW MEXICO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The State of New Mexico files this brief as *amicus curiae* in support of Respondent and urges the affirmance of the decision below. Like the other 45 States imposing sales tax, New Mexico continues to suffer a substantial loss of tax revenues as a consequence of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). True to Justice Fortas' prediction that "this haven of immunity may well increase in size and importance," *id*. at 764 (Fortas, J.

dissenting), it was estimated in 1986 that New Mexico lost up to $23 million a year in taxes on mail order sales.[1] Massive technological changes in the direct marketing industry now permit laser-like targeting of computer-segmented markets and the seductive ease and immediacy of electronic response and payment. No corporeal salesman could be this good. These changes have enormously increased the "economic presence"[2] of direct marketers in every State.

In response, many States have enacted so-called "expanded nexus" statutes. These statutes enumerate a variety of activities as indicia of "economic presence" sufficient to satisfy due process and justify making direct marketers collect and remit use tax. The application of North Dakota's extended nexus statute to the Quill Corporation has resulted in this litigation.

The North Dakota Supreme Court's decision below brilliantly explicates just how thoroughly this Court has eroded the underpinnings of *National Bellas Hess*. Subsequent decisions have overturned the commerce clause interpretation upon which that decision was based, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and have expanded the kinds of activities deemed sufficient to satisfy the due process requirement of nexus, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). No longer does the commerce clause hold interstate commerce immune from nondiscriminatory State tax. No longer does due process bar a State from taxing companies, like Quill, that exhibit undisputable "economic

[1]Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-Of-State Mail Order Sales* (1986).

[2]The Court in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988), recognized the significance of "economic presence" in determining nexus for taxing authority.

presence" by conducting millions of dollars of business annually within that State. Justice VandeWalle's eloquent and incisive decision says it all. It speaks for all the States. New Mexico fully supports Respondent and its *amici*.

New Mexico writes separately because it has taken a different approach to taxing direct marketing sales. While other States have focused narrowly on overturning *National Bellas Hess* by showing sufficient economic presence of direct marketers to impose *use* tax, New Mexico has broadened the scope of inquiry to include the issue of who should be taxing the *sale* itself. This analysis has led New Mexico to situate mail order sales within the broader conceptual scheme of the Court's modern commerce clause doctrine and to impose its gross receipts tax, rather than its compensating use tax, on mail order sales. New Mexico's gross receipts tax regulation is set out in the margin.[3]

[3]New Mexico's regulation governing mail order sales reads as follows:

G.R. Regulation 3(F):85 - MAIL ORDER SALES

An out-of-state mail-order or direct-marketing seller who regularly ships goods to New Mexico customers is engaging in business in New Mexico and shall pay gross receipts tax on receipts from all sales which occur in New Mexico.

The place where a sale occurs shall be determined under the provisions of the Uniform Commercial Code (UCC). UCC Section 2-106(1) [See Chapter 55, NMSA 1978] defines "sale" as consisting "in the passing of title from the seller to the buyer for a price." UCC Section 2-327(1) controls when title passes in a "sale on approval": "Under a sale on approval unless otherwise agreed . . . risk of loss and the title do not pass to the buyer until acceptance." A sale which permits the return of delivered goods within a certain time period if the customer is not fully satisfied even though the goods conform to the contract is a "sale on approval" under UCC Section 3-326. UCC Section 2-401(2) controls when title passes in an ordinary sale: "Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which

New Mexico also writes to urge the Court to recognize the doctrinal simplification of the *Complete Auto* test implicit in its recent cases. Under the uniquely commerce-clause prongs of *Complete Auto*, a State's tax may not impose multiple or discriminatory burdens on interstate commerce and must be internally and externally consistent.[4] In practical application to transactional taxes, all of these aspects of the *Complete Auto* test are satisfied by answering two simple questions: 1) does the transaction taxed occur exclusively within the State, and 2) does the State equally tax local commerce for those transactions.

Locating the transaction taxed and answering these two questions inform New Mexico's approach to taxing mail order sales. Under Uniform Commercial Code provisions common to forty-nine States, the location of a mail order sale lies within the purchaser's State when the purchaser accepts the goods. UCC Sections 2-106(1), 2-236 and 2-327(1). Prior to acceptance, the goods remain the property of the direct marketer. Thus, the sale to a New Mexico customer occurs in New Mexico and

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the seller completes his performance with reference to the physical delivery of the goods. . . . If the contract requires delivery at [the] destination, title passes on tender there." Mail order sales generally require delivery to the customer at the customer's location.

Notwithstanding the above standard for determining where the sale occurs, if the seller's state determines for any reason that a particular sale occurred in the seller's state and was subject to sales tax in that state which the seller has paid and not had refunded, that sale shall not be subject to gross receipts tax in New Mexico.

[4]The second and third prongs of *Complete Auto* forbid state taxes that discriminate against interstate commerce and are not fairly apportioned so as to subject interstate commerce to multiple taxation. *Complete Auto*, 430 U.S. at 279. See footnotes 6 and 13, *infra*. The internal and external consistency tests are discussed in *Goldberg v. Sweet*, 488 U.S. 252, 261-262 (1989). See footnote 10, *infra*.

New Mexico taxes the sale.

New Mexico bases its taxing jurisdiction on the reality of the marketplace—the commercial relationship between direct marketer and customer. We believe this approach, upon which the North Dakota Supreme Court reserved judgment, provides a more comprehensive analysis of State taxation of direct market sales than focusing on the collection of use tax. For New Mexico to impose its use tax would imply, incorrectly, that the sale has occurred elsewhere. The direct approach of taxing the sale, itself, is at once more consistent with the Court's recent commerce clause interpretation and more closely tied to traditional due process standards of permitting States to impose tax in return for protecting a taxpayer's property. New Mexico's interest in filing this *amicus* brief is to encourage the Court in its decision in *Quill* to provide a definitive resolution of the entire issue of State authority to tax mail order sales.

SUMMARY OF ARGUMENT

The dormant commerce clause no longer renders sales in interstate commerce immune from State taxation. The four-prong *Complete Auto* test can be simplified when applied to transactional taxes: a State may tax any transaction in interstate commerce occurring exclusively within that State so long as it taxes the same transactions by local businesses equally and fully. Mail order sales are thus subject to sales tax in the State where the sale occurs. The demand for certainty in commercial relations has created uniform rules under the Uniform Commercial Code specifying that a mail order sale—a "sale on approval"—occurs when the purchaser accepts the goods. This means that the sale takes place in the receiving State and that the mail order company retains ownership of the goods within

the receiving State up to the time of acceptance. The mail order company's ownership of property in the receiving State provides sufficient nexus under both the due process and commerce clauses for the receiving State to exert its judicial and taxing jurisdiction over the mail order company for the sale. The receiving State complies with the dormant commerce clause requirement of equal treatment for interstate commerce by taxing out-of-state mail order sales equally with local sales.

ARGUMENT

I. IMPOSITION OF SALES TAX, RATHER THAN USE TAX, BY THE STATE IN WHICH THE MAIL ORDER SALE OCCURS COMPLIES WITH ALL DORMANT COMMERCE CLAUSE LIMITATIONS.

A. The Court's Modern Interpretation of the Commerce Clause Permits a State to Tax Any Transaction Occurring Within the State Provided the State Taxes Local Commerce for Those Same Transactions Equally and Fully.

Quill Corp. v. North Dakota presents the Court with an excellent opportunity to place the capstone on its modern commerce clause doctrine with regard to State taxation of interstate sales. Starting with *Western Live Stock v. Bureau of Revenue*[5] and culminating in *Complete Auto*[6], the Court has

developed a modern commerce clause analysis that treats interstate commerce equally with local commerce. In *Complete Auto*, the Court ended years of wavering by definitively rejecting the line of cases permitting interstate commerce to enjoy a free-trade immunity from State taxation. *See, e.g.*, *Freeman v. Hewit*, 329 U.S. 249 (1946). In doing so, the Court abandoned such fine distinctions as interstate vs. local sales[7] and direct vs. indirect burdens on interstate commerce.[8]

In interpreting and applying its modern standard in *Complete Auto* over the last 15 years, the Court has distilled to a high degree of conceptual clarity the two simple, essential conditions imposed by the dormant commerce clause on State transactional[9] taxes. These conditions permit States to tax *any*

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[5] 303 U.S. 250 (1938). *Western Live Stock* marked the beginning of the Court's clear statement that interstate commerce was subject to taxation just like any other form of commerce.

> It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. "Even interstate business must pay its way."

Id. at 254.

[6] *Complete Auto* cemented the final abandonment of the various formulations that interstate commerce was a free trade zone with its famous four-prong test sustaining a tax "when the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 430 U.S. at 279.

[7] *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298 (1851); *Robbins v. Shelby Taxing District*, 120 U.S. 489 (1897).

[8] *Freeman v. Hewit*; *Wiloil Corp. v. Pennsylvania*, 294 U.S. 169 (1935).

[9] State income taxation of multistate and multinational businesses raises different considerations of apportionment not present with transactional taxes due to the ability to isolate in time and place the location of a transaction in

activity in interstate commerce so long as 1) the State taxes only those activities that occur exclusively within the State, and 2) the State taxes local commerce equally with interstate commerce on those activities. Transactions in interstate commerce meeting these conditions are preserved from discriminatory and multiple taxation. The Court's developing articulation of these two conditions is reflected in its discussions of the internal and external consistency tests.[10]

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interstate commerce.

[10]*See Goldberg v. Sweet*, 488 U.S. 252, 261-262 (1989); *American Trucking Association, Inc. v. Scheiner*, 483 U.S. 266, 284-286, 303 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). Allowing States to tax only those transactions occurring within the State provides external consistency. "The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg v. Sweet*, 488 U.S. at 261. Requiring the states to tax local commerce equally with interstate commerce, without credits or refunds given elsewhere, provides internal consistency. Formulating the internal consistency test as whether the tax is "structured so that if every State were to impose an identical tax, no multiple taxation would occur," *id*, forces supposition and concern about whether "actual discriminatory impact" must be shown. *See Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 257 (Scalia, J. concurring and dissenting). The real issue is whether the taxing State, itself, taxes local commerce equally. If it does not because of credits or exemptions given local commerce for some other tax paid, then its tax on the interstate transaction is directly and actually discriminatory, without reference to any hypothetical taxing behavior of other States.

1. Taxing Only In-State Activities Prevents Multiple Taxation.

By taxing only those activities that occur within the State,[11] and by measuring the tax by the extent of those activities,[12] every possibility of multiple taxation is avoided and no apportionment is needed. Because States have mutually exclusive territory, no other State can tax the activity occurring within the taxing State.

The Court in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), explicitly recognized that isolating the in-state activity taxed renders apportionment unnecessary. The Court noted that it was impossible for Washington's wholesaling tax to cause a multiple tax burden because it was imposed on an activity occurring

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[11]*Complete Auto* (transportation within the state); *Moorman Mfg Co. v. Blair*, 437 U.S. 267, 280-281 (1978) (gross receipts tax on sale to customers within the state would be "plainly valid"); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1982) (severance of coal within the state); *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986) (sale of aviation fuel within the state). *Goldberg v. Sweet* is the exception that proves the rule, where the entire service was *not* in the taxing state. The Court sustained the tax because the complexity of interstate telephone technology prevents apportionment of the tax among the states through which a call is routed and rerouted, which otherwise would prevent full and equal taxation of the interstate telephone call, and because Illinois limited its tax to those calls originating or terminating in Illinois and charged to an Illinois service address, precluding multiple taxation except in a few circumstances where a credit was provided.

[12]Measuring the tax by the extent of the activity within the state avoids the potential multiple tax burden inherent in a flat tax, *American Trucking Association, Inc. v. Scheiner*, satisfies external consistency, and meets the elusive fourth prong of *Complete Auto*. *See*, *Commonwealth Edison v. Montana*, 453 U.S. at 628-629.

solely within Washington. Tyler had asserted that the Washington tax on the full value of the wholesale transaction was impermissibly unapportioned because "the wholesale transaction is partly attributable to manufacturing activity carried out in another State that plainly has jurisdiction to tax that activity." *Id.* at 251. The Court pointed out Tyler's error:

> This apportionment argument rests on the erroneous assumption that through the B & O tax, Washington is taxing the unitary activity of manufacturing and wholesaling. We have already determined, however, that the manufacturing tax and wholesaling tax are not compensating taxes for substantially equivalent events . . . . *Thus, the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax.*

Id. (emphasis supplied). Justice Scalia in his concurring and dissenting opinion in *Tyler Pipe* shared this perception. Where a State taxes "discrete events such as sale, manufacture or delivery, which can occur in a single State or in different States, [the] apportionment principle is not applicable." *Id.* at 256. The discrete event can be taxed only in the single state of its occurrence. To the same effect is the Court's quotation of the lower court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981) upholding Montana's severance tax on coal: "'the severance can occur in no other state' and 'no other state can tax the severance.'"

Such focus on the discrete, in-state transaction being taxed avoids the need for apportionment and the risk of multiple

taxation, meeting the fair apportionment prong of *Complete Auto*. It also meets the nexus prong[13] of *Complete Auto* since the occurrence within the taxing State of the transaction, itself, necessarily ensures nexus.

2. Taxing Interstate and Local Commerce Equally for the Same In-State Activities Prevents Discriminatory Taxation

Requiring States to tax interstate and local commercial activity equally, without credits or rebates on any other tax on

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[13] The nexus prong of *Complete Auto* is really a due process requirement rather than one stemming from the commerce clause. Its derivation appears to be from two concurring opinions by Justice Rutledge quoted in *Complete Auto*. First, from *Freeman v. Hewit*, 329 U.S. 249, 271 (1946): "In his view, a state tax is unconstitutional only if the activity *lacks the necessary connection with the taxing state to give 'jurisdiction to tax,'* ... or if the tax discriminates against interstate commerce, or if the activity is subject to multiple taxation." *Complete Auto*, 430 U.S. at 281-282 (emphasis added). Second, from *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948): "'[I]t is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay *insofar as any limitation of due process or "jurisdiction to tax" in that sense is concerned.*'" *Complete Auto*, 430 U.S. at 282. (Emphasis added.)

The Court has recognized that the nexus analysis is the same under the due process clause and the commerce clause. See, *Amerada Hess Corp. v. Director, Division of Taxation*, 490 U.S. 66, 79-80 (1989):

> First, appellants recognize that the *Complete Auto* test encompasses due process standards. . . . Accordingly, having determined that the Corporation Business Tax passes all four prongs of the *Complete Auto* test, we also conclude that it does not violate due process.

The nexus requirement as to direct marketing sales is further discussed in Part II, below.

local commerce, ensures against discriminatory taxation of interstate commerce. This meets the third prong of *Complete Auto*. Both *Armco, Inc v. Hardesty*, 467 U.S. 638 (1984), and *Tyler Pipe* illustrate instances where a State effectively gave local commerce a discriminatory advantage. In *Armco*, West Virginia's tax on selling at wholesale exempted local manufacturers who had paid a manufacturer's tax. In *Tyler Pipe*, Washington's tax on manufacturers exempted those who sold their product at wholesale and paid the wholesaler's tax. Both denied tax exemptions to interstate businesses which may have paid manufacturing or wholesaling tax to another State. The Court wisely rejected the discriminatory taxes in those cases.

A State can tax any activity relating to interstate commerce, such as manufacture, warehousing, sale or transportation of goods within the State, so long as it equally taxes those same activities in local commerce. Interstate commerce is automatically protected from excessive taxation because whatever taxes are imposed on interstate commerce must also be imposed on local commerce.[14] If a State wants to tax the warehousing of goods passing through the State in interstate commerce, for instance, it must also tax the warehousing of local goods. Political pressure from local taxpayers will inevitably inhibit excessive taxation. A State will be unlikely to separately and cumulatively tax each stage of local business activity (manufacture, warehousing, wholesaling, retailing) just so the State will be able to tax whichever single aspect of an interstate business occurs within the State. Conversely, if a State does choose to require local business to pay tax at several

[14] The only exception is for the compensating use tax imposed on property acquired outside a state but used within it, because it functions entirely as a complement to the state's sales tax. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *see also*, *Maryland v. Louisiana*, 451 U.S. 725, 758-759 (1981).

separate levels of business activity, it is not discriminatory to require interstate business also to pay tax at each of those levels, albeit to different States for the different business activities located in such States. It was thus acceptable to the Court in *Tyler Pipe* to have Tyler pay wholesaling tax in Washington and manufacturing tax in the States of manufacture.

These two simple limitations on State transactional taxes—taxing only those activities within a State and taxing local businesses equally for those activities—satisfy the minimum requirements of the dormant commerce clause by guaranteeing equal treatment of interstate commerce.

B. Mail Order Sales Occur When the Purchaser Accepts the Product in the Receiving State Pursuant to Uniform Commercial Code Provisions Common to Forty-Nine States, Fully Justifying Imposition of the Receiving State's Sales Tax.

This focus on the discrete activity taxed plainly guides the correct analysis of taxation of mail order sales. For years the approach of mail order sellers has been to pretend that the sale occurs no place, not in the sending State and not in the receiving State. During the era in which the Court sheltered interstate commerce as a free-trade area, immune from State tax, this position made sense. Under the Court's current interpretation, however, such a position is revealed for what it is, a convenient method to evade taxation. Indeed, from *Western Live Stock* on, the foundation of modern commerce clause analysis has been that interstate commerce should no longer be preferred over local commerce but must pay its fair share of taxes. This means that the mail order sale, itself, should be subject to tax, once, like any other sale. The only real issue is where.

The "where" is answered by focusing on what is being taxed—the sale—and determining where that sale occurs. The State in which the mail-order sale occurs has jurisdiction to impose its sales tax. The Court has long relied upon a determination of where a sale occurs to judge the constitutionality of State sales taxes in the face of a commerce clause challenge. *See, McGoldrick v. Berwind-White Coal Co.*, 309 U.S. 33 (1940) (sales transaction took place in New York; New York's tax upheld); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) (sales transaction took place in Tennessee; Arkansas' sales tax struck down); *American Oil Co. v. Neill*, 380 U.S. 451 (1965) (sales transaction in Utah; Idaho not permitted to tax). The State of sale alone can impose its sales tax. No multiple taxation can ever occur.

By referring to the location of the sale, the Court would not be basing taxation on some arcane legal technicality, but rather on the vital necessity to clarify a crucial detail of the basic commercial transaction. The demands for certainty in commercial relations has long preceded tax decisions in laying down clear rules for when title and risk of loss pass in a sales transaction. Precisely when a sale occurs must be specified to protect the interests of buyer and seller. Forty-nine States, including New Mexico, have for many years accepted the same statutory rules in the Uniform Commercial Code (UCC) specifying where a sale occurs.[15] Numerous State courts have recognized the usefulness of this common standard and have referred to UCC provisions to determine the time and place of sale for tax purposes.[16]

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[15]Only Louisiana has not adopted the UCC.

[16]See, *Arga Co. v. Limbach*, 522 N.E.2d 1074 (Ohio 1988); *H.O. Anderson, Inc. v. Rose*, 352 S.E.2d 541 (W.Va. 1988); *Associated Milk Producers, v. Indiana Department of State Revenue*, 512 N.E.2d 917 (Ind.

Under the Uniform Commercial Code, a sale occurs when title passes. UCC §2-106(1). The typical mail order sale is specially defined in the UCC as a "sale on approval"— a sale where delivered goods may be returned to the buyer even if they "conform to the contract." UCC §2-236(1)(a).[17]

The very essence of direct marketing is the right of the purchaser to reject conforming goods. A direct marketer's guarantee to take its merchandise back if, for any reason, the customer is not satisfied is one of the keystones of successful direct marketing. The "free trial period" has been described as the "bellwether of mail order. [It m]elts away human inertia." *See*, Stone, *Successful Direct Marketing Methods* (3d ed.), p. 48. This guarantee of full refund upon return for any reason has been described as follows:

> No matter what the terms or basic offer may be, a strong guarantee is essential when selling products or services direct. For more than 90

1987); *United Technical Corp. v. Department of Revenue*, 438 N.E.2d 535 (Ill.App. 1982); *City of Richmond v. Petroleum Marketers, Inc.*, 269 S.E.2d 389 (Va. 1980); *First Coinvestors, Inc. v. Coppola*, 88 Misc.2d 495, 388 N.Y.S.2d 833 (1976); *Crown Iron Works Co. v. Commissioner of Taxation*, 214 N.W.2d 462 (Minn. 1974).

[17]UCC §2-236(1)(a) states in pertinent part:

> Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:
>
> a. A "sale on approval" if the goods are delivered primarily for use.
>
> b. A "sale or return" if the goods are delivered primarily for re .

> years, Sears, Roebuck and Company has guaranteed satisfaction for every article offered. Over the years, no one else has ever succeeded in mail order operations without duplicating the Sears guarantee or offering similar assurances.
>
> The importance of the guarantee is perhaps best understood by recognizing a negative fact of life. It is this. Over 90 years after Sears first established its ironclad guarantee, it is still a fact of human nature that one is hesitant to send for merchandise unless one knows that the product may be returned for full credit if it does not meet expectations. Guaranteed satisfactions should be the part of any offer soliciting direct sales.

Id. at p. 65. Indeed, Quill provides its customers with just such a guarantee of satisfaction.[18]

UCC §2-237(1) specifies when title and risk of loss pass in a "sale on approval," which determines where the sale takes place.

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[18]Quill's catalog makes the following offer to its customers:

> Use any product from Quill in your office FREE for 30 days. During that time, try it, inspect it, use it . . . just to be sure you're satisfied with the product. You have no reason to pay us and can return it during that period for any reason . . . no questions asked . . . and we'll give you a full credit against your invoice.

Quoted in the decision below, *State of North Dakota v. Quill Corp.*, 470 N.W.2d 203, 217, fn 13 (N.D. 1991).

> Under a sale on approval unless otherwise agreed . . . risk of loss and the title do not pass to the buyer until acceptance.

The Official Comment to §2-236 amplifies:

> A "sale on approval" or "sale or return" is distinct from other types of transactions with which they have been confused. The type of "sale on approval," "on trial" or "on satisfaction" dealt with involves a contract under which the seller undertakes a particular business risk to satisfy his prospective buyer with the appearance or performance of the goods in question. *The goods are delivered to the proposed purchaser but they remain the property of the seller until the buyer accepts them.* The price has already been agreed. The buyer's willingness to receive and test the goods is consideration for the seller's engagement to deliver and sell.

(Emphasis added.) Thus, the actual *sale* of mail order goods does not occur until the purchaser receives the property at his home or business in the receiving State and decides to accept it.

By recognizing that ordinary commercial practices will determine where a sale occurs, and by tying the incidence of tax to that determination, the Court accomplishes two things. First, it achieves certainty. The sale occurs at an identifiable time and place under the UCC rules, or under whatever alternative arrangements are explicitly agreed to by the parties. This bright line certainty in locating the sale makes absolutely clear that the State in which that sale occurs can tax it without violating the two conditions for validity under the commerce clause.

Second, this approach interferes as little as possible with normal marketplace decisions. By using these standard commercial rules that permit the intent of the parties to determine where the sale occurs, the parties can best identify and protect their interests.[19]

C. Direct Marketers Can Easily Eliminate Any Alleged Undue Burden of Collecting Use Tax for Many Separate Sales-Tax Jurisdictions If They Are Simply Willing to Pay Tax on the Sale to a Single Jurisdiction.

Using standard commercial rules also allows direct marketers to gain needed flexibility to simplify their tax situation. Currently, because direct marketers do not specify otherwise as to where title and risk of loss pass, UCC provisions control, locating the mail order sale in the receiving State. But what if the mail order seller were to specify otherwise? Pursuant to UCC provisions, a direct marketer retains the option to contract that its sales occur in the *sending* State by requiring that title pass upon delivery to ("f.o.b.") the common carrier in the sending State. The result would be that

[19]It has been suggested that the problem with allowing the parties to specify where the sale occurs is that they will arbitrarily select a jurisdiction—perhaps the moon—that will insulate the sale from tax. This "problem" is a rather silly strawman. First, it is unrealistic to believe that this Court would tolerate gross manipulation of the terms of a sale contract untied to some aspect of the transaction itself. Second, pretending that the sale occurs on the moon ultimately makes no difference. The result would be the same as where a direct marketer specifies that the sale occurs in a sending State that imposes no sales tax. In either instance, if the *sale* is not taxed, the receiving State can impose the obligation to collect and remit *use* tax on the direct marketer, for all the reasons so cogently articulated by the North Dakota Supreme Court below.

the sending State would have jurisdiction to impose its sales tax on the mail order sale.[20] The direct marketer would pay tax to a single jurisdiction—its home State—on all its sales.[21]

This option would allow Quill and other direct marketers to avoid what has long been touted as their major complaint: the burden of paying tax to some 6100 separate sales tax jurisdictions. *See Amicus Curiae* Brief of the Direct Marketing Association, pp. 16-23; *National Bellas Hess*, 386 U.S. at 759-760. Petitioner and its *amici* still raise this "undue burden on interstate commerce" as their prime reason to reaffirm *National Bellas Hess*.[22] Surely, today, this "undue burden" complaint has been nullified by the enormous advances in modern computer technology. Available software will automatically figure and prepare returns for all tax jurisdictions. Furthermore, direct marketers with retail locations in many States have for many years shown their ability to report and pay

[20]*State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co*, 372 U.S. 605, 606 (1963)("a State may levy and collect a sales tax, since the passage of title and delivery to the purchaser took place within the State" even though the property was immediately transported out of the State.)

[21]Where the seller's State taxes a mail order sale, the receiving State will not. It cannot impose its sales tax because the sale has not occurred in the receiving State. *McLeod v. J.E. Dilworth*, 322 U.S. 327 (1944). It will not impose a duplicative compensating use tax because almost every State gives a use tax credit for sales tax paid to other States. *See Williams v. Vermont*, 472 U.S. 14, 21-21 (1985).

[22]Interestingly, the burden of filing tax returns in each of the jurisdictions in which one does business has never been part of the *Complete Auto* test. The second prong concerns only fair apportionment to avoid multiple tax, not multiple tax returns. Interstate businesses have always been required to comply with the laws of each jurisdiction in which they choose to do business. When a fledgling direct marketer choses to do business in every State and county, it must be responsible to comply with the laws of each.

the appropriate tax rates for mail order sales to each State. Finally, as pointed out in Respondent's brief, the actual number of relevant tax jurisdictions is closer to 192.

But if direct marketers really are concerned about the burden of paying different tax rates to many separate jurisdictions, their option to pay a single tax rate to the sending State on all sales eliminates that concern. At least the concern is eliminated for those mail order companies genuinely worried about "undue burden" and not simply about undoing the burden. One suspects, however, that this solution is not the result that the direct marketers want. One suspects they want to pay no tax at all on their sales. To find out their true position, one can hardly ask for a nicer litmus test than the availability of this option to pay tax to a single jurisdiction. It provides the Court an easy way to uncover whether the direct marketers object to the burden of paying tax to too many jurisdictions or the burden of paying tax even to one.

New Mexico's proposed analysis does not eliminate the need to resolve the "economic presence" issue. Several States have no sales tax and others exempt out-bound sales from tax. Direct marketers from those States may be tempted to specify that title passes in the sending State, not in order to pay a single jurisdiction's tax, but in hopes of paying no tax. Were they to do so, the receiving State would then be fully entitled to impose its use tax, as North Dakota does now, on these mail order sales for all the reasons argued by Respondent and its *amici*.

The essence of modern commerce clause analysis is that interstate commerce shall not be specially advantaged, that it shall not be immune from nondiscriminatory State taxes. The proper result is not necessarily to have a *particular* State tax the mail order sale, but simply to be clear that *one* State is authorized to tax each mail order sale in order to level the

playing field for local merchants in the receiving State who are subject to their State's sales tax. The objectives of the commerce clause are achieved. Interstate commerce is neither specially benefitted nor unduly burdened.

Under current practices and in the case at bar, direct marketing sales transactions occur in the receiving State, supporting imposition of its sales tax. New Mexico believes that by taxing the sale, itself, rather than seeking to impose the obligation to collect and remit use tax, it achieves a more comprehensive resolution of the issue within the Court's modern commerce clause doctrine. It also reveals a very traditional answer to the due process requirement of nexus, to which we now turn.

II. THE PRESENCE OF THE DIRECT MARKETER'S PROPERTY IN THE RECEIVING STATE PROVIDES THE DUE PROCESS NEXUS FOR THAT STATE TO IMPOSE SALES TAX ON THE DIRECT MARKETER FOR SALES OF ITS PROPERTY IN THAT STATE.

Does the nexus requirement of the due process clause prevent the receiving State from taxing a direct marketer for sales delivered to purchasers in the receiving State or from requiring a direct marketer to collect and remit the use tax imposed on the purchaser by the receiving State?

The Court has long recognized the legal principle that the presence in a State of tangible property belonging to a taxpayer provides nexus for that State to impose tax on that property and on transactions related to that property. *D.H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24 (1988); *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 559, (1977); *Curry v. McCanless*, 307 U.S. 357, 363 (1939); *Frick v. Commonwealth of Pennsylvania*, 268 U.S. 473, 492-494

(1925); *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905)("It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power."). As the Court put it in *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954) "due process requires some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax." Does the direct marketer have property within the receiving State? Does the sales transaction of that property occur within the receiving State?

Under the UCC provisions cited above, mail order goods sold to New Mexico residents by an out-of-state direct marketer remain the property of the seller until acceptance by the purchaser. For the period of time those goods are within the receiving State——while being delivered over its highways, stored at the common carrier's warehouse and awaiting approval at the residence or business of the purchaser——these goods remain the property of the direct marketer until the purchaser accepts them. Sometimes the purchaser does not accept them. If a shirt does not fit, for instance, or its color displeases, it can be returned for full refund. And it is returned without title ever having transferred to the purchaser. In either case, the seller and its property receive the benefits of the civilized society the receiving State provides—police and fire protection, roads, etc. These goods, and transactions involving these goods, have nexus aplenty with the receiving State in the most traditional sense of the concept. *D.H. Holmes Co.*; *Miller Bros.*.

National Bellas Hess never reached this issue. The Court described the facts of that case by citing language from the State Supreme Court decision: "'[National] . . . does not own any tangible property, real or personal, in Illinois'". *National Bellas Hess*, 386 U.S. at 754. The Court apparently assumed on the basis of the stipulated facts that the transfer of title

occurred in the sending State upon delivery of the goods to the common carrier. This may have been a correct assumption if the sales contract so provided. But the Court in *National Bellas Hess* did recognize a "sharp distinction . . . drawn between mail order sellers with retail outlets, solicitors *or property within a State* and those who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business." *Id.*, at 758. (Emphasis supplied.) Direct marketers do have property in the State—the goods sold—under UCC standards. They argue that this language refers to some property of the seller *other* than the goods sold. But that makes no sense. Surely the most appropriate basis supporting nexus for taxing jurisdiction is the presence within the State of the very property subject to the tax.

North Dakota can certainly answer an unqualified "Yes!" to the "'simple but controlling question . . . whether the State has given anything for which it can ask return.'" *National Bellas Hess*, quoting *Wisconsin v. J.C. Penney Co.* at 311 U.S. 435, 444 (1940). North Dakota provides the civilized society that creates a market for Quill's products and actually protects those products within North Dakota while they remain under Quill's ownership until acceptance by the purchasers, or until return to Quill. North Dakota does, in fact, keep Quill's property safe from fire, theft, plague, civil strife and highwaymen.

CONCLUSION

The North Dakota Supreme Court decision irrefutably explains why North Dakota can constitutionally impose on Quill the obligation to collect and remit use tax. But the use tax issue arises only if the State of sale has not imposed its sales tax. Under statutory provisions common to virtually every State, the

mail order sale actually takes place in the receiving State. That State may, as New Mexico does, impose its sales or gross receipts tax on that mail order sale. The location of the sales transaction in the receiving State fully satisfies the requirements of the due process and commerce clauses.

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